IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-227

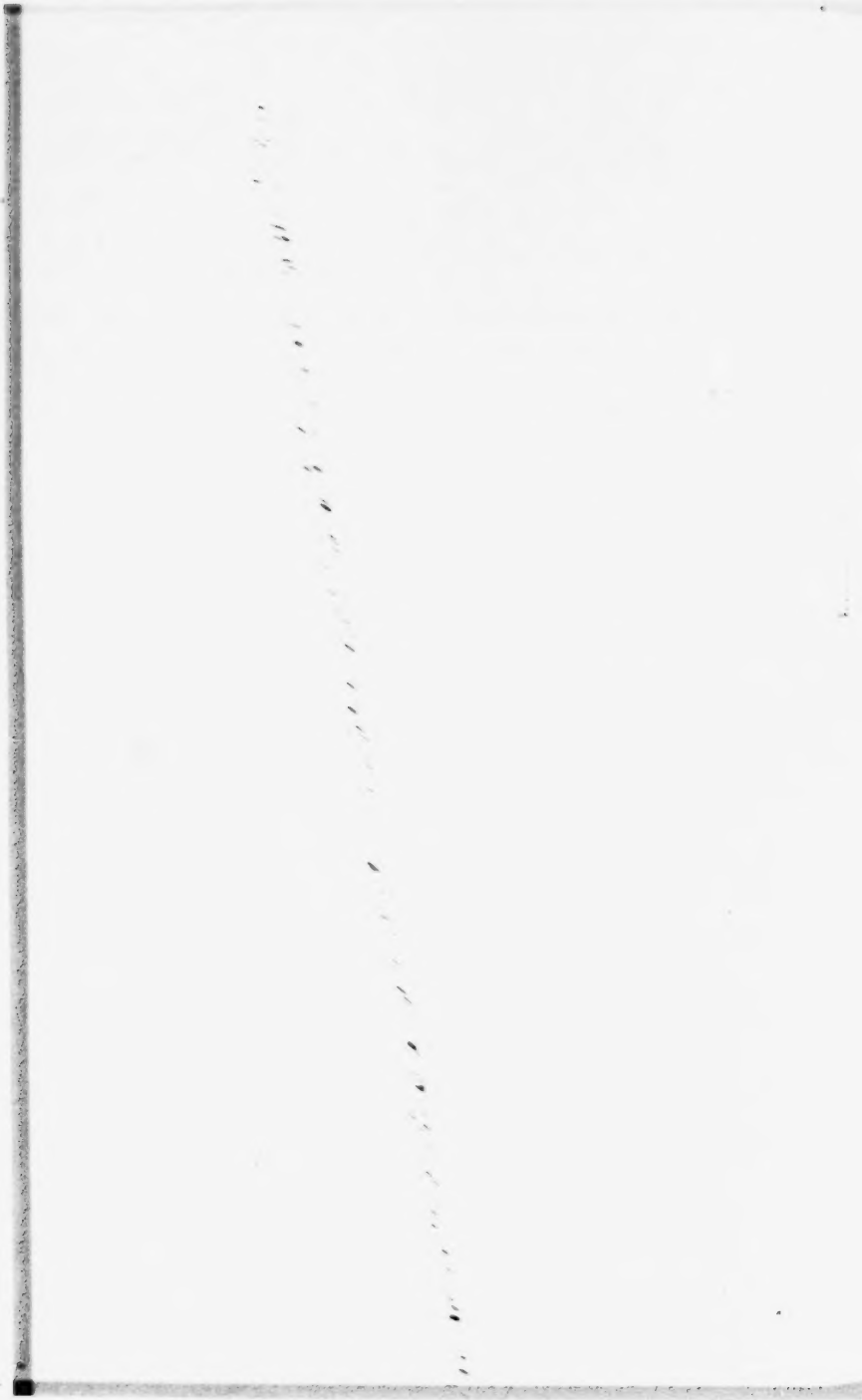
CHILDREN'S REHABILITATION CENTER, INC.,
a Corporation, Petitioner
v.
THE SERVICE EMPLOYEES
INTERNATIONAL UNION,
LOCAL NO. 227, AFL-CIO, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DONALD T. O'CONNOR
1800 Oliver Building
Pittsburgh, Pennsylvania 15222
Attorney for Petitioner
Children's Rehabilitation Center, Inc.

Of Counsel:
R. A. KING and
BUCHANAN, INGERSOLL, RODEWALD,
KYLE & BUERGER
1800 Oliver Building
Pittsburgh, Pennsylvania 15222

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219



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IN THE

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No.

CHILDREN'S REHABILITATION CENTER, INC.,
a Corporation, Petitioner
v.
THE SERVICE EMPLOYEES
INTERNATIONAL UNION,
LOCAL NO. 227, AFL-CIO, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Children's Rehabilitation Center, Inc., prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit entered in this case on August 7, 1974.

THE OPINIONS BELOW

Petitioner seeks review of the opinion and judgment of the United States Court of Appeals for the Third Circuit, (Hastie and Aldisert, C.J.J. with Seitz, Chief Judge dissenting) filed on August 7, 1974, affirming the order entered by the United States District Court for the Western District of Pennsylvania on June 26, 1973 in which the Complaint filed by Children's Rehabilitation Center, Inc. in the instant case was dismissed. The opinion and judgment of the Court of Appeals, not yet

officially reported, is printed as Appendix A to this petition. The Order of the Court of Appeals denying petitioner's motion for an order enlarging the time within which a petition for rehearing may be filed, entered on September 18, 1974, is printed as Appendix B to this petition.

The orders of the District Court dismissing this action and denying a motion for reconsideration and oral argument are unreported and are printed as Appendices C and D, respectively, to this petition.

JURISDICTION

The opinion and judgment of the Court of Appeals was rendered on August 7, 1974, affirming the order of dismissal entered by the District Court on June 26, 1973. A motion for an order enlarging the time within which a petition for rehearing may be filed was denied on September 18, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 22(3) of the Rules of this Court.

QUESTIONS PRESENTED

1. Where a labor organization materially breaches a collective bargaining agreement by engaging in a work stoppage in violation of a no strike clause, is the traditional contract remedy of terminating the contract for all purposes of performance and suing for damages available to an employer under Section 301 of the Labor-Management Relations Act, 1947 (LMRA)?

2. Where a labor organization, without first giving notice to the Federal Mediation and Conciliation Service as required by Section 8(d)(3) of the National Labor Relations Act (NLRA), engages in a work stoppage which is in violation of Section 8(d)(4) of the NLRA and which also is a material breach of an existing collective bargaining agreement, does the employer waive its right to recover damages against the labor organization under Section 301 of the LMRA when it elects to consider the collective bargaining agreement no longer enforceable by the labor organization because, under Section 8(d) of the NLRA, the striking employees have lost their status as employees and the labor organization has forfeited its status as the certified representative of the employer's employees?

3. Where a labor organization has materially breached a collective bargaining agreement and violated Sections 8(d)(3) and 8(d)(4) of the NLRA, the employer has notified the labor organization that it "considers the Agreement to be terminated in its entirety" and there is no evidence of what the employer intended by such notice, may a court find as a matter of law that there was a rescission of the collective bargaining agreement?

4. Where an employer elects to rescind a collective bargaining agreement because of a material breach and there is no evidence that the labor organization has materially changed its position as a consequence of the employers election of rescission, may a court find that the election is irrecovable?

5. Should a court, after finding that a collective bargaining agreement has been irrevocably rescinded by an employer due to a material breach by a labor organization, dismiss an employer's suit for damages and prevent the employer from amending its complaint for the purpose of requesting restitution of the consideration it paid to the labor organization and its members?

STATUTES INVOLVED

This case involves Section 8(d) of the National Labor Relations Act, as amended, 29 U.S.C. §158(d),[1] and Section 301 of the Labor Management Relations Act, 1947, as amended by 51 Stat. 136, 29 U.S.C. §185. These sections are set forth in Appendix E to this petition.

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(1) Section 8(d) of the National Labor Relations Act as used herein refers to 29 U.S.C. §158(d) as amended by 61 Stat. 136, 73 Stat. 519 but not by 88 Stat. 395.

STATEMENT OF THE CASE

Children's Rehabilitation Center, Inc. (hereinafter Center) operates a twenty-four hour nursing care facility for mentally retarded and physically handicapped children. On August 2, 1971, the Service Employees International Union, Local No. 227, AFL-CIO (hereinafter Union) and the Center entered into a collective bargaining agreement for three years in which Article VI provided that:

> The Union agrees that there shall be no strikes, stoppages, slowdowns or refusals to work of any character and the Employer agrees that there shall be no lockouts during the term of this Agreement.

Beginning on December 4, 1972, the Union, without having given thirty (30) days prior written notice to the Federal Mediation and Conciliation Service as required by Section 8(d)(3) of the NLRA commenced an illegal work stoppage in violation of the no strike clause in the collective bargaining agreement as well as in violation of Section 8(d)(4) of the NLRA. The Union established a picket line at the Center's entrance on December 4, 1972 which the Union maintained on a continuous basis.

On December 12, 1972 the Center advised the Union that because the strike was unlawful, the Center would exercise any and all of its legal remedies available if the strike was not terminated by December 15, 1972. Because the strike was not terminated by December 15th, the Center notified the Union that it considered the agreement to be terminated in its entirety.

On January 3, 1973, while the strike and picketing continued, the Center commenced the instant action in the District Court for the Western District of Pennsyl-

vania under Section 301 of the LMRA alleging that the Union by engaging in the unlawful work stoppage and by picketing the Center's facility breached the no-strike clause in the collective bargaining agreement and further violated Section 8(d) of the NLRA. Damages amounting to seventeen thousand and fifty dollars ($17,050.00) plus five hundred and fifty dollars ($550.00) for each day the strike and the picketing continued after January 3, 1973 were demanded.

Upon a Motion to Dismiss the Complaint on the grounds that it failed to state a claim upon which relief may be granted, the District Court, on briefs submitted by the parties but without benefit of oral argument, entered an order on June 26, 1973 dismissing the Complaint. After denial of its Motion for Reconsideration and Oral Argument on July 19, 1973, the Center filed an appeal with the United States Court of Appeals for the Third Circuit which affirmed the order of dismissal entered by the District Court.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Erroneously Decided An Important Question of Federal Law, Which Has Not Been Heretofore Settled but Should Be Settled by This Court, When It Held That an Employer Does Not Have Available To It Upon a Material Breach of a Collective Bargaining Agreement by a Labor Organization the Traditional Contract Remedy of Terminating the Contract For All Purposes of Performance and Suing For Damages Even Though the Labor Organization Has Failed To Comply With Section 8(d)(3) of the NLRA and Has Conducted a Strike in Violation of Section 8(d)(4) of the NLRA, but Rather the Employer Must Waive Its Rights Guaranteed by Section 8(d) of the NLRA To Consider the Labor Organization as Having Forfeited Its Bargaining Rights and To Consider the Collective Bargaining Agreement Unenforceable by the Labor Organization In Order To Recover Damages Under Section 301 of the LMRA.

By virtue of the decision of the Third Circuit, when a labor organization materially breaches a collective bargaining agreement, an employer is no longer entitled to elect the traditional contract remedy of terminating the contract for purposes of performance and suing for damages. This important issue which has not been heretofore settled should be settled by this Court in that the effect of the decision of the Third Circuit undermines the federal labor law policy which has developed under Section 8(d) of the NLRA and Section 301 of the LMRA.

Preliminarily, it should be noted that both lower courts properly viewed the violation of the no-strike

clause in the collective bargaining agreement to be a material breach of contract. *NLRB v. Columbian Enameling & Stamping Co., Inc.*, 96 F. 2d 948, 953 (7th Cir. 1938) *aff'd.* 306 U.S. 292; *Marathon Electric Mfg. Corp.*, 106 NLRB 1171 (1953) *aff'd. in part and enforced in part sub nom., United Electrical Workers, Local No. 1113 v. NLRB,* 223 F. 2d 338 (D.C. Cir. 1955) *cert. denied* 350 U.S. 981 (1956). With this initial determination made, the question of what remedies are available arises. It has traditionally been the law that where one party materially breaches a contract, the injured party has an election to pursue one of three remedies:

> (1) He may treat the contract as rescinded, and recover upon quantum meruit so far as he has performed; or
>
> (2) he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover under the contract; or
>
> (3) he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing.... 6 R.C.L. §389, p. 1032

See also, Sitlington v. Fulton, 281 F. 2d 552, 555 (10th Cir. 1960). This Court has historically recognized the unquestioned availability of the last of the above-mentioned three remedies upon a material breach of contract. *Anvil Mining Company v. Humble,* 153 U.S. 540 (1894). This remedy has similarly been recognized in a collective bargaining situation. *See, United Electrical Workers, Local 1113, supra,* 223 F. 2d at 341.

No case has been found, with the exception of the decision of the Third Circuit in this case, which indicates that the traditional remedy of terminating the contract for all purposes of performance and suing for damages is not available to an employer in a suit under Section 301 of the LMRA for a material breach of a collective bargaining agreement by a labor organization. Similarly there is nothing in the legislative history of Section 301 which would indicate that this remedy should be withdrawn from an employer in a suit for a material breach of a collective bargaining agreement. On the contrary, the legislative history of Section 301 mandates the conclusion that all remedies, legal and equitable, should be available to further the national labor law policy of enforcement of collective bargaining agreements and stabilization of industrial relations. *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 U.S. 448 (1957); S. Rep. No. 105, 80th Cong., 1st Sess., pp. 15-17; 93 Cong. Rec. 3656-3657 (Remarks of Mr. Barden). Withholding a traditional contract remedy which is based upon the concept of compensation for damages incurred, does not effectuate the enunciated national labor law policy but rather engenders the idea that the innocent employer to a collective bargaining agreement will not be compensated for the damages it suffers as a result of a material breach by a labor organization. This drastic concept is brought into sharper focus in a case such as this where the strike not only constitutes a material breach of a collective bargaining agreement by also is in violation of Sections 8(d)(3) and 8(d)(4) of the NLRA.

Where a union engages in a work stoppage in violation of Section 8(d)(4) of the NLRA and the striking employees lose their status as employees under Section

8(d), the employer has the right to consider the union's bargaining rights forfeited. *Fort Smith Chairs Company,* 143 NLRB 514 (1963) *aff'd. sub nom.,* 336 F. 2d 738 (D.C. Cir. 1964) *cert. denied* 397 U.S. 838 1964); *Marathon Electric Mfg. Corp.,* 106 NLRB 1171 (1953) *aff'd. in part and enforced in part sub nom., United Electrical Workers, Local No. 1113 v. NLRB,* 223 F. 2d 338 (D.C. Cir. 1955) *cert. denied* 350 U.S. 981 (1956). In the instant case the union had been certified by the NLRB on March 24, 1971. The employer on December 15, 1972 validly withdrew its recognition of the union and as a result the union lost its status as the currently certified representative of the employer's employees.[2] Where a union loses its status as the representative of the employees, any collective bargaining agreement it may have had with the employer becomes unenforceable. *Retail Clerks v. Montgomery Ward,* 316 F. 2d 754 (7th Cir. 1963); *Kenin v. Warner Brothers Pictures, Inc.,* 188 F. Supp. 690 (S.D. N.Y. 1960).

Section 301 of the LMRA and Section 8(d) of the NLRA were adopted by Congress simultaneously (Public Law No. 101, 80th Congress of the United States, Chapter 120, First Sessions, H.R. 3020, passed June 23, 1947, over the President's veto). They were designed

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(2) In a related case, *Service Employees' International Union, Local No. 227, AFL-CIO (Children's Rehabilitation Center, Inc.)* 211 NLRB No. 120 (1974) (a copy of which decision is printed in pertinent part as Appendix F), the NLRB held that an expedited election held pursuant to Section 8(b)(7)(C) of the NLRA was valid. One of the requirements of an expedited election under Section 8(b)(7)(C) is that the picketing union not be "currently certified as the representative of such employees."

to encourage labor peace and discourage economic warfare. *See, Mastro Plastics Corp. v. NLRB,* 350 U.S. 270, 284 (1956); *Textile Workers Union of America v. Lincoln Mills of Alabama, supra.* In Section 8(d) Congress intended to encourage stable labor relations by substituting collective bargaining, under the auspices of Federal Mediation and Conciliation, for economic warfare. The utilization of the Mediation Service was considered by Congress to be a vital part of the collective bargaining machinery under Section 8(d) and not merely an ancillary feature. *Local Union 219, Retail Clerks International Association AFL-CIO v. NLRB,* 265 F. 2d 814, 817 (D.C. Cir. 1959). At the same time Congress intended to encourage stabler labor relations under Section 301 of the LMRA by allowing the injured party to sue in Federal Court for damages arising out of a breach of a collective bargaining agreement. There is nothing in the legislative history or the cases interpreting these two sections that suggests that an employer in order to elect its rights under one section must waive its rights under the other section. On the contrary, these two sections must be read together in fashioning a uniform national labor law policy. *Howard Johnson Company, Inc. v. Detroit Local Joint Executive Board,* ——— U.S. ———, 94 S. Ct. 2236, 2240 (1974); S. Rep. No. 105, 80th Cong., 1st Sess. p. 30.

The decision of the Third Circuit would frustrate federal labor law policy by requiring a financially distressed employer to continue to recognize a union that has lost its majority status under Section 8(d) in order that it may sue for damages under Section 301. Clearly, Congress did not intend such a result.

While in most cases work does resume after a strike with a large part, if not all, of a collective bargaining

agreement intact, this basis, upon which the Third Circuit rested its decision of extinguishing a traditional contract remedy in the name of federal labor law policy, is nonexistent in the instant case. The employees lost their status as employees and the union lost its status as the representative of the said employees by virtue of the violation of Sections 8(d)(3) and 8(d)(4). No continuing relationship with the employer exists upon which to make such a policy decision. *Service Employees' International Union, Local No. 227, AFL-CIO (Children's Rehabilitation Center, Inc.), supra.*

The decision of the Third Circuit puts a labor organization in an enviable position of not having to pay any damages for a strike that not only is in violation of a no strike clause in a contract but also is in violation of Section 8(d) of the NLRA if the employer lawfully withdraws recognition or in the alternative, of not losing its bargaining rights if the employer elects to sue for damages. The direct result of such a decision is that a financially distressed employer in order to sue for damages would be forced unlawfully to continue to recognize a union and enforce a labor agreement requiring mandatory union membership and union dues deductions after 30 days.

This Court should take the opportunity presented by this petition to define the remedies available to an employer upon the material breach of a collective bargaining agreement by a labor organization and reconcile the underlying policy of Section 8(d) with those remedies.

II. This Court Should Grant the Writ To Review the Conduct of the Court of Appeals Because the Court of Appeals So Far Departed From the Accepted and Usual Course of Appellate Review as To Call For an Exercise of This Court's Power of Supervision in That the Court of Appeals Necessarily Made Certain Findings of Fact for Which There Is No Basis In the Record and Erroneously Applied the Applicable Law.

On December 15, 1972, the Petitioner notified the Respondent that it "consider[ed] the Agreement to be terminated in its entirety." There is absolutely no evidence in the record to indicate the intent of the Petitioner with regard to this notice or the purpose for which it was given. According to the applicable law, an election to rescind must be "clear and unambiguous and convey an unmistakable purpose to insist on rescission." *Maloney v. Madrid Motor Corporation,* 385 Pa. 224, 228 (1956); *Land O'Sun Dairies,* 107 NLRB 1195, 1197 (1954); 12 *Williston on Contracts* §1460 (3d Ed. 1970). The question of whether a party has "rescinded" a contract is a question of fact to be decided by a jury. *Kirk v. Brentwood Manor Homes, Inc.,* 191 Pa. Super 488 (1960). Notwithstanding the fact that the applicable law was before the Court, the Third Circuit held as a matter of law that the notice from Petitioner to Respondent constituted a rescission of the collective bargaining agreement.

There are at least three possibilities which are consistent with the wording of the notice: (1) the Petitioner intended to rescind, (2) the Petitioner was excusing itself from further performance under the Agreement due to material breach and was going to sue for damages, or

(3) the Petitioner was asserting its rights under Section 8(d) of the NLRA because of the labor organization's failure to comply therewith without the intent to abandon its rights to sue for damages. When all possibilities are consistent with the wording of the notice and when none of the possibilities are more likely than another, then as a matter of law a court should not find that Petitioner intended one of the possibilities over another. *cf. Tot v. United States,* 319 U.S. 463 (1943); *Wilkins v. American Export Isbrandtsen Lines, Inc.,* 446 F. 2d 480 (2d Cir. 1971). However, in order to hold that the collective bargaining agreement had been rescinded, the Third Circuit must necessarily have found that the notice by itself conclusively indicated an intent and purpose to rescind. In addition to the three consistent possibilities which existed as a basis for the notice, the decision of the Third Circuit is particularly disturbing in view of the many different meanings which have been ascribed to the word "terminate", some of which are quite consistent with retention of a damage remedy. *See,* 5A *Corbin, Contracts* §1236 (1964); 12 *Williston on Contracts,* §1454A, pp. 12-14 (3d Ed. 1970); 12 *Williston on Contracts* §1455, n. 2 (3d Ed. 1970). As stated in *Williston,*

> [W]ords have their importance. If wrongly used, wrong ideas are sure to follow, and wrong decisions follow wrong ideas. It is a source of serious confusion in the cases that a contract is frequently spoken of as "rescinded" or "put an end to" when in truth, one party to the contract has merely exercised his right to refuse to perform because of the wrong conduct of the other party. 11 *Williston on Contracts* §1305, p. 93 (3d Ed. 1970).

It is significant to note that Petitioner never used the terms "rescind" or "rescission." On the contrary, the language used by Petitioner was consistent with the retention of a damage remedy. *See, Anvil Mining Co. v. Humble, supra.* In view of the above possibilities which existed as a basis for the notice and the different meanings attached to the word "terminate", the Third Circuit exceeded the scope of permissible review. As stated by this Court in *United States v. Diebold,* 369 U.S. 654 (1962) while reversing a summary judgment entered in favor of the defendant:

> On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. 369 U.S. at 655.

See also, H&M Cake Box, Inc. v. Bakery and Confectionery Workers, 454 F. 2d 716, 718 (1st Cir. 1972).

Furthermore, even assuming that the notification indicated an intent to rescind as a matter of law, the mere manifestation of an intention to pursue one remedy rather than another is not an irrevocable election until the other party materially changes his position in reasonable reliance thereon. *Restatement of Law, Contracts,* §381, Comment (b) (7); *12 Williston on Contracts* §1469, pp. 209-210 (3d Ed. 1970). The record is void of any evidence that Respondent materially changed its position because of and/or reasonably relied upon the notification of December 15, 1972 as effecting a rescission of the agreement between the parties. The conduct of Respondent in remaining on strike and picketing

Petitioner's facility is just as consistent with the position that the union claimed that the agreement was in effect as with the position that the union considered the agreement as having been rescinded. No conclusive presumption should be drawn in such a case as was done by the Third Circuit. *United States v. Diebold, supra; Wilkins v. American Export Isbrandtsen Lines, Inc., supra.*

Moreover, even if the notice effected an irrevocable rescission of the Agreement, the Petitioner should be entitled to amend its Complaint so as to recover the consideration paid and to be restored to its former position prior to entering into the Agreement with Respondent. The act of rescission requires the parties to be put back where they were before the contract. *Industrial Corp. v. Lillian Field's Estate,* 132 F. 2d 887 (4th Cir. 1943). Under the decision of the Third Circuit, the employer is left without a remedy to recover the consideration which it gave in exchange for an agreement containing a no-strike clause. In addition to undermining the enforceability of no-strike clauses, this decision flys squarely in the face of and is contrary to established law. *Logan County Bank v. Townsend,* 139 U.S. 67 (1891).

CONCLUSION

For the reasons stated above, the Petitioner prays that a writ of certiorari be granted.

Respectfully Submitted,
DONALD T. O'CONNOR

Of Counsel:
R. A. KING and
BUCHANAN, INGERSOLL, RODEWALD,
KYLE & BUERGER
October, 1974

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 73-1748

CHILDREN'S REHABILITATION CENTER, INC.,
A CORPORATION,
Appellant
vs.
THE SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL NO. 227, AFL-CIO
(D. C. Civil Action No. 73-11)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
Present: SEITZ, Chief Judge and HASTIE and ALDISERT,
Circuit Judges

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed June 27, 1973, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

THOMAS P. QUINN
Clerk

August 7, 1974

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1748

CHILDREN'S REHABILITATION CENTER, INC.,
A CORPORATION,
Appealant,
v.
THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 227, AFL-CIO.

Donald T. O'Connor, *Esquire,*
Randolph and O'Connor
Attorneys for Appellant
Condon, Klocke, Ange, Gervase & Sedita,
Attorneys for Appellee
Grace Marie Ange, *Of Counsel,*
1440 Rand Building,
Buffalo, New York 14203.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued January 18, 1974
Before: SEITZ, *Chief Judge;* and HASTIE and ALDISERT, *Circuit Judges.*

Appendix A.

Opinion of the Court
[Filed August 7, 1974]

HASTIE, *Circuit Judge.*

On motion, the district court dismissed, for failure to state a claim upon which relief could be granted, an employer's action for money damages for breach of contract against a union that represented its employees. The action was brought under Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. §185.

The complaint alleged that a strike, which had begun on December 4, 1972 and was still in progress, had been called by the Union in violation of a no strike provision in the parties' labor contract. For this breach damages were claimed in the amount of $550 per day, beginning December 4, 1972. The complaint also alleged that "on Friday, December 15, 1972, the work stoppage not having terminated, the Plaintiff notified the Defendant that it considers the Agreement to be terminated in its entirety".

It was the theory of the district court that the employer's admitted December 15 election to "terminate" the labor contract "in its entirety" deprived it of the remedy it now seeks.

In cases arising under Section 301 of the Labor-Management Relations Act the courts of the United States are shaping a national common law of labor relations. In that process it has been established that a violation of a no strike provision of a comprehensive labor contract does not *ipso factor* relieve the employer of the complex of legal obligations that the contract has imposed upon it. *Drake Bakeries, Inc. v. Local 50, American Bakery Workers,* 1962, 370 U.S. 254; *Local Union No. 721, United Packingsouse, F. & A. Workers v. Need-*

ham Packing Co., 1964, 376 U.S. 247. However, the cited cases do not reach the question whether such a breach could empower the employer, by a clear pronouncement to the union, unilaterally to abrogate the entire labor contract. That remedy for material breach of a contract was available at common law "at the option of the injured party, and it should be, and in general is allowed . . . for any breach of contract of so material and substantial nature as would constitute a defense of an action brought by the party in default for refusal to proceed with the contract". 12 *Williston, Contracts*, 3d ed. 1970, 186.

The district court, properly cited *Boeing Airplane Co. v. Aeronautical Industrial District Lodge 751, I.A.M.*, W.D.Wash, 1950, 91 F.Supp 596, *aff'd.*, 9th Cir. 1951, 188 F.2d 356, *cert. denied* 342 U.S. 39, as a precedent for the recognition of such power where a labor contract has been breached by a prohibited strike. *Accord. United Electrical R. & M. Workers v. N.L.R.B.*, 1955, 96 U.S. App.D.C. 46, 223 F. 2d 338. See also *Local Joint Executive Board v. Nationwide Downtowner Motor Inns, Inc.*, W.D. Mo. 1964, 229 F.Supp. 413, 416. Moreover, in the present case, the union has acquiesced in and now relies upon the termination of the labor contract. Therefore, the district court correctly stated in its dispositive order "that plaintiff cannot properly claim damages for continuing breach of labor contract . . . [after] December 15, 1972. . . ."

However, in dismissing the complaint the court denied relief for injury sustained before as well as after the December 15 contract termination, despite the claim for damages in the amount of $550 dollars per day, beginning December 4, 1972, and despite the fact that juris-

diction under Section 301 does not depend upon the amount in controversy.

It is arguable that the injured party's abrogation of a breached labor contract should be effective only to free the parties of future obligations under their comprehensive long term bargain, and not to destroy any cause of action for pre-termination damages attributable to the breach. But we think that limitation should not be recognized in the evolving federal common law of labor relations.

A detailed labor contract promotes economic stability by defining terms and conditions of employment, usually for a term of several years. After most strikes, whether legal or illegal, that occur while a labor contract is in effect, work is resumed with a large part, if not all, of the labor contract intact. Certainly such continuity in the mutually agreed terms and conditions of employment is in the public interest and should be encouraged. On the other hand, fairness to an employer confronted by an illegal strike may dictate judicial recognition of contract abrogation or damages as alternative available remedies. But it is neither necessary nor desirable to encourage the termination of labor contracts by allowing both remedies. From this viewpoint, the loss of the right it otherwise would have to collect damages for a breach is not an unfair price for an employer to pay if it insists upon total and permanent relief from the obligations it accepted under a labor contract.

Accordingly, the judgment will be affirmed.

To the Clerk:

Please file the foregoing opinion.

.....

WILLIAM H. HASTIE
Circuit Judge

Appendix A.

CHILDREN'S REHABILITATION CENTER, INC. v. THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 227, AFL-CIO
No. 73-1748

SEITZ, *Chief Judge,* Dissenting.

Plaintiff appeals from the dismissal, for failure to state a claim, of its damage action against defendant union for striking allegedly in violation of the parties' contract. Plaintiff's complaint states that plaintiff notified defendant that the strike not having ceased after a demand by plaintiff it "consider[ed] the Agreement to be terminated in its entirety." The district court apparently concluded that this language amounted to a rescission of the collective bargaining agreement and that, having elected to rescind, the employer could not sue for damages.

Preliminarily, I note that the parties neither in their briefs nor in their argument here or, so far as appears from its order, in the district court questioned the existence of plaintiff's right unilaterally to abrogate the entire labor agreement in response to defendant's violation of a no-strike clause in the contract. Were I called upon to decide that issue, which is reached by the majority, I doubt that I could find allowing rescission of a labor contract consistent with the federal labor law.

Certainly, this issue cannot be resolved simply by reference to rules governing traditional contractual relation; in suits such as this over bargaining agreements we must fashion a federal "common law," guided by the policies of the federal labor laws. *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 456-57 (1957). One of the primary goals of our national labor laws is the promotion of industrial peace. To that end, parties are encouraged to enter into contracts, after collective bar-

gaining, regulating the conduct of labor relations between them. While the parties cannot be forced by the NLRB or the courts to enter such an agreement, and the terms of any agreement are determined by the parties, where these terms are unclear the courts will interpret them in a manner likely to encourage stable and orderly labor relations. Contractual mechanisms for resolving disputes are interpreted broadly, *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960), and activities undermining agreed upon means of dispute resolution are held "implicitly" proscribed. *Gateway Coal Co. v. United Mine Workers*, 42 U.S.L.W. 4095, 4099-4101 (U.S. Jan. 8, 1974); *Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 105-06 (1962).

Where parties have not clearly agreed to make their labor contract rescindable by the aggrieved party on breach, this policy of encouraging stable labor relations would seem to militate against interpreting bargaining agreements to allow rescission. If rescission is allowed in response to a strike or lockout, the whole contractual relation between the parties is destroyed; there is no contract to which to return after resolution of the often limited issue over which the strike or lock-out occurred. And, where, as here, the parties dispute whether there has in fact been a rescission, the resultant uncertainty is likely to prolong the disruption caused by the initial disagreement. During the lengthy period required for judicial resolution of this issue, the parties will differ not over a single substantive provision, but over the existence of any live agreement governing their relations. Certainly, there may be a limited deterrent effect in allowing the threat of rescission to check strikes and lockouts. I cannot, however, conceive that this benefit could offset the substantial disruption that allowing rescission would cause.

These policies which should control a decision, when appropriate, on the existence of a right to rescind, should also control our selection of a standard for finding rescission in this case. Assuming, as I must, that material breach of a collective bargaining agreement permits the aggrieved party to rescind the entire agreement, I would require that clear evidence of an intent to rescind must be produced by the party claiming that consequence.

The only permissible basis for finding an intent to rescind by the employer was plaintiff's statement that "it consider[ed] the Agreement to be terminated in its entirety." This communication is couched in language that parties, courts and commentators have used for numerous disparate purposes. Although, for instance, an aggrieved party's notification to the breaching party that the contract was "terminated" has been held to show rescission, *Boeing Airplane Co. v. Aeronautical Ind.* District L. No. 751, 91 F. Supp. 596, 613 (W.D. Wash.), *aff'd,* 188 F.2d 356, 357 (9th Cir.), *cert. denied,* 342 U.S. 821 (1951), there are numerous other instances where both courts and commentators have held that use of the word "termination" conveys quite different meanings, some consistent with retention of the damage remedy. 12 S. Williston, Contracts §1455, n. 2 (3d Ed. 1970); 5A A. Corbin, Contracts §1236 (1964). Even the word "rescind" is used in situations where the contract is still in force. 12 S. Williston, Contracts §1454A (3d Ed. 1970).

In light of the conflict the inference of rescission may have with the federal labor law and the different uses of the words employed by plaintiff, some consistent with retention of a damage claim, I believe the district court erred in finding, as a matter of law, that the plaintiff's letter was clear evidence of plaintiff's intent to rescind.

Since the evidence of plaintiff's intent to rescind was not conclusive of rescission as a matter of law, I believe the issue was not properly reached on a motion to dismiss. Rather, the issue here was for the jury under proper instructions. If the jury found that plaintiff intended to rescind the contract, it also would be required to determine whether defendant relied on the rescission before the plaintiff declared his intent that the contract still have force. Only if both rescission and reliance are found should plaintiff's damage claim be held barred.

Under the majority opinion, both these issues are taken from the jury. They have found not only that plaintiff's intent to rescind appears conclusively from its communication, but also that defendant has relied on plaintiff's rescission sufficiently to bind plaintiff to its election of remedies. Thus, they state that ". . . the union has acquiesced in and now relies upon the termination of the labor contract." I believe that, even under traditional contract doctrines, it is irrelevant that defendant *now* relies on the rescission as a defense to plaintiff's damage suit. To bar plaintiff's damage claim, defendant must have relied to its detriment on plaintiff's rescission before learning of plaintiff's "changed" position, i.e., that it did not consider the contract rescinded.

The only basis for inferring that defendant relied on plaintiff's alleged rescission is the continuance of the strike. Although defendant claims it would not have prolonged the strike but for plaintiff's statement that the contract was terminated, this claim is hardly sufficient to establish reliance as a matter of law. The fact finder might well conclude that the continuance of the strike was not based on the union's present interpretation of plaintiff's communication.

For all these reasons I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 73-1748

CHILDREN'S REHABILITATION CENTER, INC., A CORPORATION,

Appellant

vs.

THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 227, AFL-CIO

Present: SEITZ, Chief Judge, and HASTIE and ALDISERT, Circuit Judges.

Upon consideration of Appellant's motion for an order enlarging the time within which a petition for rehearing may be filed in the above-entitled case,

It is ORDERED that appellant's motion for leave to file its petition for rehearing out of time be, and the same is hereby denied.

By the Court,

WILLIAM H. HASTIE
Circuit Judge

Dated: September 18, 1974

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CHILDREN'S REHABILITATION CENTER, INC., a Corporation Plaintiff, v. THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL No. 227, AFL-CIO Defendants.	CIVIL ACTION No. 73-11

Order

AND NOW, this 26th day of June, 1973, upon consideration of defendant's motion to dismiss, and of plaintiff's motion to strike defendant's motion to dismiss and for entry of default, and of briefs in support thereof and in opposition thereto, and it appearing to the Court that defendant's notice of motion (in New York form) verified January 17, 1973, was duly served upon plaintiff's attorneys and sufficed to alert them of defendant's intention although said notice was irregular and should not have been filed; and that although defendant's time to plead expired on January 29, 1973, defendant's motion to dismiss was in fact filed on April 16, 1973, with due notice to plaintiff's counsel, before plaintiff took advantage of defendant's delay by filing on May 3, 1973, its motion for default judgment on the pleadings and to strike defendant's motion to dismiss, and the Court therefore being of opinion that said motion to dismiss is properly before the Court for disposi-

tion on the merits, and the Court further being of opinion that plaintiff can not properly claim damages for continuing breach of labor contract having notified defendant on December 15, 1972, "that it considers the Agreement to be terminated in its entirety."

IT IS ORDERED that plaintiff's motion for default and to strike be and they hereby are denied, and that defendant's motion to dismiss be and it hereby is granted, and the above-styled case be and it hereby is dismissed.

/s/ DUMBAULD
United States District Judge

Copies to:
Louis B. Kushner, Esq.
300 Grant Bldg. (15219)
Donald T. O'Connor, Esq.
3400 Grant Bldg. (15219)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CHILDREN'S REHABILITATION CENTER, INC., A Corp.
Plaintiff,
v.
THE SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL No. 227, AFL-CIO
Defendants.

CIVIL ACTION No. 73-11

Order

AND NOW, this 19th day of July, 1973, upon consideration of plaintiff's motion to reconsider this Court's order of June 26, 1973, and of plaintiff's renewed motion for default judgment, and the Court being of opinion that the issues involved were carefully considered by this Court to the best of its ability when making its said order, and that further consideration by this Court would simply further delay authoritative resolution of these issues on appeal (the case on its merits being one involving interesting and important issues of contract law, like the case of *Holt v. Seversky Electronatom Corp.*, 452 F. 2d 31, 34 (C. A. 2, 1971), where, as Judge Friendly has pointed out, there was a conflict between the treatises of Williston and Corbin on contracts),

Appendix E.

IT IS ORDERED that said motions be and they hereby are denied.

/s/ DUMBAULD
United States District Judge
Louis Kirshner, Esq.
300 Grant Bldg. (15219)

Copies to:
Donald T. O'Connor, Esq.
3400 Grant Bldg. (15219)

APPENDIX E

STATUTES

Section 301 of the LMRA as amended, 61 Stat. 136, 29 U.S.C. § 185(a), provides:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 8(d) of the NLRA as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 158(d), provides:

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours,

and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158 to 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

Appendix F.

APPENDIX F

211 NLRB No. 120

MFKP
D-8605
Butler, Pa.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL NO. 227, AFL-CIO
and
CHILDREN'S REHABILITATION CENTER, INC.
Case 6-CP-231

Decision and Order

On October 30, 1973, Administrative Law Judge Paul E. Weil issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed a brief in support of the Administrative Law Judge's Decision.

* * *

Respondent claims that the Administrative Law Judge improperly deprived it of its right to challenge the validity of the expedited election held in Case 6-RM-484. That election was directed pursuant to the provisions of Section 8(b)(7)(C) following the dismissal of 8(a)(1), (3), and (5) charges filed by Respondent. The Regional Director dismissed those charges in Case 6-CA-6477 upon concluding, on the basis of his investigation, that the Charging Party had not bargained in bad faith and that Respondent's strike against the Charging Party was an unlawful one, and that the employees participating therein had lost their status as employees for purposes of Section 8 of the Act, because timely notice had not been given to the Federal Mediation and Conciliation Service as required by Section 8(d) of the Act. The dismissal was sustained by the General Counsel on appeal.

Appendix F.

Respondent's effort to contest the validity of the expedited election takes the form of an attack upon the validity of the dismissal of its unfair labor practice charges. As indicated above, it complains that it was repeatedly denied the opportunity in the proceeding before the Administrative Law Judge to introduce evidence relating to those charges and that this was error. But, the disposition of unfair labor practice charges and the issuance of complaints are matters vested by Section 3(d) of the Act within the exclusive province of the General Counsel and the Board may not review or reexamine the administrative determinations made by him in this area.[1] This, in essence, is what Respondent asks that we do.

However, inasmuch as we have no alternative in the circumstances of this case but to respect the regularity of the General Counsel's actions in dismissing Respondent's unfair labor practice charges and in directing and conducting the expedited election, we hold that such election which Respondent lost was a valid one under the Act. It follows that Respondent's picketing to force recognition or bargaining within 12 months following that election violated Section 8(b)(7)(B) of the Act, as found by the Administrative Law Judge.[2]

* * *

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(1) *Local 182, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Woodward Motors)*, 135 NLRB 851, enfd. 314 F.2d 53 (C.A. 2). See also *Times Square Stores Corporation*, 79 NLRB 361.

(2) In our view of the case, we need not consider what significance attaches to the fact that Respondent failed to contest the direction of the expedited election in the representation proceeding.

* * *

Appendix F.

[SEAL]

.....
Edward B. Miller, Chairman

.....
Ralph E. Kennedy, Member

.....
John A. Penello, Member

.....
NATIONAL LABOR RELATIONS BOARD

* * *

JD—651—73
Butler, Pa.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL NO. 227, AFL-CIO
and
CHILDREN'S REHABILITATION CENTER, INC.
Case 6—CP—231

Howard Grossinger, Esq., of Pittsburgh, Pa., for the General Counsel.

Donald T. O'Connor, Esq. (Randolph & O'Conner), of Pittsburgh, Pa., for the Charging Party.

Grace Marie Ange, Esq., of Buffalo, N.Y., for the Respondent.

Appendix F.

Decision

STATEMENT OF THE CASE

PAUL E. WEIL, Administrative Law Judge: On April 3, 1973, Children's Rehabilitation Center, Inc., hereinafter called the Charging Party, filed with the Regional Director for Region 6 of the National Labor Relations Board, hereinafter called the Board, a charge alleging that Service Employees' Internationl Union, Local No. 227, AFL-CIO, hereinafter called Respondent, engaged in picketing of the Charging Party's premises in Butler, Pennsylvania, in violation of Section 8(b)(7)(B) of the Act. On April 13, 1973, the Acting Regional Director on behalf of the General Counsel of the Board issued a complaint and notice of hearing. In its duly filed answer the Respondent admitted various allegations of the complaint and denied others and denied the commission of any unfair labor practices.

* * *

On the entire record in this case and in consideration of the briefs, I make the following:

* * *

FINDINGS OF FACT

III. The Alleged Unfair Labor Practices

A. Background

On March 24, 1971, Respondent was certified as a representative of certain employees of the Charging Party at its Butler, Pennsylvania, facility, and, on August 2, 1971, entered into a collective-bargaining agreement which was to be effective for a 3-year period ending August 1, 1974. The agreement contained a wage reopener clause which provided for the renegotiation of

wages each year on the anniversary date of the agreement. The Union reopened for negotiations in 1972 and on October 11, 1972, filed a charge with the Board (Case 6—CA—6356) alleging that the Charging Party was not bargaining in good faith. The charge was dismissed on November 29, 1972.

On December 4, Respondent began picketing at the Charging Party's entrance. This picketing continued without hiatus until April 6, 1973. On December 15, the Employer withdrew its recognition of Respondent and 3 days later filed a charge alleging a violation of Section 8(b)(7)(C) (Case 6—CP—226). In addition the Charging Party filed an RM petition covering the certified unit (Case 6—RM—484). On December 21, Respondent filed a charge alleging 8(a)(1), (3), and (5) violations which was dismissed on February 6, 1973, appealed to the General Counsel and sustained. On March 14, 1973, the Acting Regional Director directed an expedited election in Case 6—RM—484 and 5 days later approved the Charging Party's request to withdraw Case 6—CP—226.

An election was conducted on March 20, 1973, and the employees rejected Respondent as their collective-bargaining representative. No striking employee attempted to vote. Neither a request for special permission to appeal the Acting Regional Director's direction of the expedited election nor objections to the election were filed by Respondent in Case 6—RM—484.

On April 2, 1973, the Acting Regional Director for Region 6 issued the certification of the results of the election and the following day the charge in the instant case was filed by the Employer alleging a violation of Section 8(b)(7)(B).

Appendix F.

Respondent at the hearing herein attempted to litigate whether the 8(a)(5) charge (Case 6—CA—6356) had merit and whether the 8(a)(1), (3), and (5) charge (Case 6—CA—6477) was properly dismissed. I held this evidence immaterial on the grounds that the issues were not before me, a ruling which I now reiterate.

DISCUSSION AND CONCLUSIONS

The statute provides that a union violates the Act when it pickets an employer with the object of forcing the employer to recognize or bargain with the Union as a representative of his employees when, within the preceding 12 months, a valid selection under Section 9(c) of the Act has been conducted. Here the Union admits that it picketed the Charging Party, and Union President James Lindsay testified that an objective of its picketing was to force the Charging Party to recognize and bargain with Respondent as the representative of its employees.

Respondent contends however that the election which was conducted on March 20, 1973, was not a valid election within the meaning of Section 8(b)(7)(B). This contention is based on Respondent's argument that the 8(a)(5) charge had merit as did the 8(a)(1) and (3) charge, the picketing called into question by the earlier 8(b)(7) charge was in fact lawful and an expedited election could not properly be held. While these are interesting contentions, I cannot reach them within the framework of this case. A violation is made out by the General Counsel herein if the election which was conducted on March 20 was valid. The Act sets forth certain prerequisites to support a contention that an election is invalid. These include the requirement that the object-

ing party file its objections with the Board to raise the issue. Respondent stipulated that it objected neither to the order of the Acting Regional Director directing the expedited election nor to the conduct of the election after it took place. As the court said in the *Delsea Iron Works, Inc.*, case,[1] "[u]nder these circumstances [the absence of an appeal of the direction of the election and the absence of objections], the Company must be deemed to have relinquished any right it might have had to object to the Regional Director's directing of a special election and the conducting of the proceeding under the expedited procedure." Of course, in the instant case, it is the Union not the Company that is complaining, too late, that the election is invalid. The Act provides no different ground rules for the Union than for the Company and the rule as stated by the court is equally applicable herein.

Having found that all of the elements of the violation of Section 8(b)(7)(B) have been admitted by Respondent or shown by the General Counsel to exist, it follows that Respondent has violated Section 8(b)(7)(B) of the Act.

* * *

(1) *N.L.R.B. v. Delsea Iron Works, Inc.*, 334 F.2d 67 (C.A. 3).